

STATE OF MAINE, ACTING THROUGH THE)	PETITION TO REVOKE,
STATE PLANNING OFFICE)	MODIFY OR SUSPEND
OLD TOWN, PENOBSCOT COUNTY, MAINE)	SOLID WASTE LICENSE
JUNIPER RIDGE LANDFILL)	
CHANGE IN MSW BYPASS LIMIT)	
#S-020700-WD-W-M)	DISMISSAL

ATTACHMENT A

documentation of mailing on March 4, 2011,

and

Board Findings of Fact and Order (Denial)
dated March 3, 2011

of Appeal by PERC and MRC
of Department Order #S-020700-WD-W-M



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STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

PAUL R. LEPAGE
GOVERNOR

Susan M. Lessard

CHAIR

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Office Specialist II

March 4, 2011

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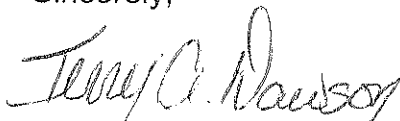
Re: Hazardous Waste Septage and Solid Waste Management Act License In The Matter
Of: State of Maine / State Planning Office -- Department Order S-020700-WD-W-M

Dear Mr. Van Slyke:

Enclosed, please find your copy of the Board of Environmental Protection's decision regarding the appeal submitted by you concerning the above referenced Department Order related to the minor revision permit approval to allow the use of municipal solid waste bypass as a protective soft layer in landfill cells at Juniper Ridge.

This decision may be appealed by filing a petition in Superior Court within 30 days after receipt of notice of the decision if you are a party to the proceeding, and within 40 days of the date of the decision if you are not a party. For legal guidance on a petition to Superior Court, you should consult 5 M.R.S.A. Section 11001 et. seq. and Rule 80C of the Maine Rules of Civil Procedure.

Sincerely,


Terry A. Dawson, OS II

Enclosure: Board Order In The Matter Of: State of Maine
State Planning Office S-020700-WD-W-M

cc: BEP Service List (dated 10/19/2010)
BEP Interested Person Service List (dated 10/19/2010)

Board of Environmental Protection
Appeal HW: State Planning Office S-020700-WD-W-M
BEP Service List (10/19/2010)

Official Copy for Filings
(by 4:00 p.m.)

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Board of Environmental Protection – Interested Persons Service List (10/19/2010)
Appeal HW: State Planning Office S-020700-WD-W-M

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STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
STATE HOUSE STATION 17
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BOARD ORDER
IN THE MATTER OF

STATE OF MAINE, ACTING THROUGH THE)	APPEAL OF SOLID
STATE PLANNING OFFICE)	WASTE LICENSE
OLD TOWN, PENOBSCOT COUNTY, MAINE)	
JUNIPER RIDGE LANDFILL)	FINDINGS OF FACT
CHANGE IN MSW BYPASS LIMIT)	AND ORDER
#S-020700-WD-W-M)	(DENIAL)

Pursuant to the provisions of the *Maine Hazardous Waste, Septage and Solid Waste Management Act*, 38 M.R.S.A. §§1301 to 1310-Y and 06-096 CMR 2 *Rules Concerning the Processing of Applications and Other Administrative Matters* (last amended April 1, 2003), 06-096 CMR 400 *Solid Waste Management Rules: General Provisions* (last amended July 20, 2010), and 06-096 CMR 401 *Solid Waste Management Rules: Landfill Siting, Design and Operation* (last amended July 20, 2010), the Board of Environmental Protection ("Board") has considered the appeal jointly filed by the Penobscot Energy Recovery Company ("PERC") and the Municipal Review Committee ("MRC") of the Department's approval of the above-noted license application. Based upon materials in Department's file, the Board finds the following facts:

1. DESCRIPTION

On September 10, 2010, the Department issued Order #S-020700-WD-W-M (hereinafter "the minor revision license") which approved, with conditions, the request by the State Planning Office ("SPO") to modify Department Order #S-020700-WD-N-A (hereinafter "the amendment license"), which, in part, placed an annual total limit of 310,000 tons on the amount of unprocessed municipal solid waste ("MSW") accepted by the Maine Energy Recovery Company ("Maine Energy") incinerator in Biddeford, Maine plus the unprocessed MSW bypassed by Maine Energy to Pine Tree Landfill ("Pine Tree") in Hampden, Maine and Juniper Ridge Landfill ("JRL") in Old Town, Maine. The minor revision license approved the acceptance of unprocessed MSW bypassed from Maine Energy outside the 310,000 tons annual limit when the additional MSW bypass is specifically used in the protective "soft layer" required by 06-096 CMR 401.2.D(4)(a)(vii).

On October 13, 2010, PERC and MRC ("the appellant"), submitted a timely appeal of the Commissioner's license approval, requesting that the Board modify the minor revision license as follows: remove all references to the suitability of other waste streams used as soft layer material; remove all references to the use of MSW as a soft layer for future cells at JRL and Maine Energy as the sole supplier of the MSW; limit the minor revision license approval to the 31,440 cubic yards of MSW bypass calculated to be needed for the Cell 6 soft layer; and require that MSW bypass used in the soft layer for Cell 6 and all future cells be included in the 310,000 tons annual limit placed on Maine Energy, Pine

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remand the minor revision license to the Department for a full technical review and analysis through the licensing amendment process, including appropriate materials for use in the soft layer and how MSW could be placed in new cells in conjunction with other waste streams to minimize its use pursuant to the statutory solid waste hierarchy. The appellant further requested that the Board hold a public hearing on its appeal.

2. BACKGROUND INFORMATION

The conditions on the JRL amendment license addressing the acceptance of unprocessed MSW for disposal originated with an application from Pine Tree to accept the same waste.

A. Pine Tree Landfill in Hampden: On March 26, 2001, Sawyer Environmental Recovery Facilities, Inc. ("SERF"), the predecessor of Pine Tree, filed a minor revision application to accept unprocessed MSW bypassed from the 4 incinerators in Maine: PERC in Orrington, Maine Energy in Biddeford, RWS (now ecomaine) in Portland, and Mid-Maine Waste Action Corp in Auburn. On February 26, 2002 the application was approved in Department Order #S-001987-WD-QA-M.

Along with several other persons, MRC participated in the above application process. In a letter dated May 1 2001, MRC identified its issues with the acceptance of unprocessed MSW bypass from the incinerators as follows: it would violate the prior basis for approval of the landfill; it would violate the state's overall regulatory and management policies including the state waste management hierarchy and preservation of landfill capacity; and it would cause a financial hardship to PERC and the municipalities that rely on PERC as a long-term method of municipal solid waste disposal. The MRC asked that the Department defer making a decision on the above application until the Department reviewed a benefit determination ("PBD") application and that the above proposal be filed as an amendment application, including a formal public process, rather than a minor revision. In addition, MRC stated that PERC has significant capacity available to accept additional MSW from within the State of Maine, and suggested that MSW bypass should go to other incinerators instead, since incineration is higher in the waste hierarchy. Notwithstanding this, MRC stated it believed codisposal of PERC's bypass at Pine Tree would not require a license amendment.

During processing of the application, the Department addressed the issues raised by interested persons. During the review, the Department noted that the pending application did not include any additional capacity nor require changes to any findings of fact made in the Pine Tree Secure III Expansion base license; thus a new

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Many of the interested persons commented on the draft license. The common thread was concern that ownership of both Maine Energy and Pine Tree by Casella Waste Systems, Inc. ("Casella") would lead to Maine Energy contracting for more solid waste than it could handle with the intention of diverting the excess waste to Pine Tree as bypass. MRC also expressed concern that approval to take MSW bypass could result in Pine Tree taking MSW that should go to PERC, in violation of a settlement agreement between Energy National, Inc.; Casella; PERC; the PERC Management Company Limited Partnership; SERF; and MRC and dated March 1, 2001. Department staff worked with Pine Tree, Maine Energy and the interested persons to explore options that would result in effective control of unprocessed MSW delivered to Pine Tree for disposal. The interested persons were clearly looking for the Department to limit the amount of MSW Maine Energy could accept; the Department did not have the regulatory authority to impose such a limit in a license for Pine Tree.

On March 28, 2002, the MRC appealed Department Order #S-001987-WD-QA-M to the Board. The basis for its appeal was that unprocessed MSW from Maine Energy

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approved for disposal at Pine Tree Landfill, even with the 310,000 tons annual limit placed on Maine Energy and Pine Tree Landfill, could significantly shorten the life of Pine Tree Landfill and reduce landfill capacity available in Maine for other solid waste because 310,000 tons per year was more MSW than Maine Energy would handle.

Over the next several months, MRC, Pine Tree, Maine Energy, several of the other interested persons, and Department staff worked to tighten the language associated with MSW bypass from Maine Energy, and to resolve whether 310,000 tons per year was the correct limit to have in the license. In August 2002, MRC agreed to withdraw its appeal if Maine Energy and PTL agreed to add language to the condition containing the 310,000 tons per year limit that stated the annual amount of refuse-derived fuel¹ would not be less than 70% of the total amount of MSW processed by Maine Energy. On August 15, 2002 Maine Energy provided its agreement to this language. On August 21, 2002, the Department issued a corrected copy of Department Order #S-001987-WD-QA-M that includes the 70% refuse-derived fuel yield language. On August 22, 2002, MRC withdrew its appeal of Department Order # S-001987-WD-QA-M.

Department staff tracked, by incinerator, the volume of unprocessed MSW bypass sent to Pine Tree, the volume of refuse-derived fuel sent to Pine Tree, and the annual refuse-derived fuel yield at Maine Energy until Pine Tree ceased accepting putrescible waste on May 31, 2007 in accordance with a Schedule of Compliance dated October 26, 2007. No violations of Department Order #S-001987-WD-QA-M occurred.

- B. JRL in Old Town: In June 2003, the Maine Legislature passed Resolve 2003, Chapter 93 authorizing the SPO to purchase the existing and operating West Old Town Landfill, now known as JRL, from Fort James Operating Company for use as a state-owned landfill. The same resolve authorized SPO to contract for the operation of the landfill; after a competitive bid process SPO selected Casella as the operator. On October 30, 2003, SPO submitted an amendment application to broaden the solid wastes (including special wastes) approved for disposal at JRL and increase the licensed vertical height of JRL (with no horizontal increase in the landfill footprint). Unprocessed MSW from the 4 Maine incinerators was included in the list of waste streams to be accepted. During the review, Casella confirmed its willingness to have the same conditions and limits contained in Pine Tree's license #S-001987-WD-QA-

¹ At PERC and Maine Energy, incoming MSW is processed into refuse-derived fuel which is supplied to the boiler(s).

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M placed in the JRL amendment license, meaning the 310,000 tons annual limit would be split between Maine Energy, Pine Tree and JRL. The Department approved the amendment application (Department Order #S-020700-WD-N-A) on April 9, 2004, after an exhaustive review, with all of the conditions relating to the acceptance of MSW bypass that were in the Pine Tree minor revision.

Department staff track, by incinerator, the volume of unprocessed MSW bypass sent to JRL, the volume of refuse-derived fuel sent to JRL, and the annual refuse-derived fuel yield at Maine Energy. No violations of Conditions #16, 17, or 19 of the amendment license have occurred.

3. PROCEDURAL HISTORY

- A. As originally approved on April 9, 2007 (Department Order #S-020700-WD-N-A or the amendment license), SPO was conditionally licensed to accept unprocessed MSW bypass from the 4 Maine incinerators.
- B. On October 3, 2006 SPO, through its agent NEWSME Landfill Operations, LLC ("NEWSME"), filed a minor revision application (assigned #S-020700-WD-W-M) to increase the 310,000 tons annual limit placed on JRL and Maine Energy by condition #16.C of the amendment license to 325,000 tons per year. The minor revision application remained pending, and the 310,000 tons per year limit was not exceeded.
- C. On December 10, 2009 SPO, through NEWSME, modified the above minor revision application. SPO and NEWSME requested that the MSW bypass from Maine Energy calculated to be needed for use in the "soft layer" required as the first layer placed in new landfill cells be exempted from the 310,000 tons per year limit specified in condition #16.C of the amendment license. The request to increase the limit to 325,000 tons per year was eliminated.
- D. At each quarterly meeting of the JRL Landfill Advisory Committee, pending applications are summarized by Department staff, and questions answered. The minor revision application was discussed at the meetings.
- E. Each month, SPO issues a status report on JRL that includes section on license applications submitted and licenses received during the month.
- F. On September 10, 2010, Department Order #S-020700-WD-W-M approved the minor revision application. The license allows unprocessed MSW bypass from Maine Energy that is used in the required soft layer in new landfill cells to be

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excluded from the 310,000 tons per year limit required by condition #16.C of the amendment license. The license sets separate limits and reporting requirements on the MSW bypass used in the soft layer, and approves the use of up to 31,400 cubic yards of MSW bypass in the soft layer of Cell 6, constructed in 2010. The remaining provisions of conditions #16, 17 and 19 of the amendment license remained unchanged.

G. On October 13, 2010, MRC and PERC jointly filed a timely appeal of the Commissioner's license approval. The appeal included a request for a public hearing. No documents or other information not already considered part of the Department's record of the application were included in the appeal.

H. In a letter dated November 15, 2010, SPO and NEWSME jointly responded to the points brought forth by the appellant, MRC and PERC.

4. STANDING AS AN AGGRIEVED PERSON

The appellant consists of 2 persons filing a joint appeal: MRC and PERC. MRC is a non-profit corporation organized under Maine law. It consists of over 175 member municipalities which transport MSW to PERC for disposal. The MRC members collectively own a minority interest in PERC, which provides MRC with a direct financial and strategic interest in PERC. PERC is a waste-to-energy facility (MSW incinerator) located in Orrington, Maine that was founded in 2001. PERC services hundreds of municipalities in Maine. The appellant argues that it is an aggrieved person as defined in 06-096 CMR 2.1(B) because the minor revision license approval of an increase in MSW bypass disposal "flips Maine Legislature's solid waste management hierarchy on its head" and allows PERC's competitor, Maine Energy, to process more out-of-state waste to the detriment of other Maine incinerators. The appellant further argues that the minor revision directly injures the appellant in at least 3 ways: it provides a competitive advantage to Maine Energy by increasing its limit of MSW bypass above the current limit of 310,000 tons per year to the detriment of PERC and MRC; it calls into question the overall capacity at JRL for wastes contractually required to be accepted by PERC; and it calls for MSW bypass to be used as the soft layer in cells constructed at JRL starting with Cell 6, instead of front-end processing residue ("FEPR"), ash and other waste materials supplied by PERC that were previously used as the soft layer.

The waste management hierarchy is established in 38 M.R.S.A. §2101. Incineration is listed as the next to last priority, and land disposal is the last. However, as discussed substantively in Finding of Fact #8, below, the use of MSW bypass in the soft layer at JRL does not "flip thehierarchy on its head". 06-096 CMR 403.5(A)(3) requires that

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all incinerators have a contract(s) for the disposal of ash, bypass and residues. Both Maine Energy and PERC have contracts with JRL for the disposal of these wastes. The contracts the incinerators have with their users define "bypass"; both the amendment license and the minor revision license recognize that bypass has a contractual meaning that may not be ignored in order to secure MSW bypass for the soft layer in new landfill cells. If sufficient MSW bypass is unavailable, from any of the 4 Maine incinerators under the terms of their contracts with their users, to be the primary waste used in the soft layer it is probable the Department would require soil be at least a component of the soft layer since the soft layer serves a technical purpose (protection of the liner system) rather than capacity. Use of soil to ensure protection of the liner system would result in less capacity for waste being available in a cell, and cause the use of native resources.

The minor revision license does not provide a competitive advantage to Maine Energy; the minor revision license does not prohibit MSW bypass from PERC or the other 2 Maine incinerators from being used in the soft layer. As discussed substantively in Finding of Fact #8, below, it is apparent the appellant misread the minor revision; the minor revision modifies only the 310,000 tons annual limit placed on both Maine Energy and JRL in Condition #16.C. All other findings of fact, conclusions and conditions remain the same, which means PERC's ability to deliver MSW bypass to JRL remains unchanged. The minor revision does not require that MSW bypass used in the soft layer come from Maine Energy; in fact, according to the appeal documents, JRL approached PERC about supplying MSW bypass for Cell 6. Maine Energy is the only Maine incinerator with a limit placed by the Department's solid waste program on the amount of MSW it may accept; that limit was first placed on it in 2002 at MRC's request (see Finding of Fact #2, above). PERC is not limited in the amount of MSW it may accept. PERC also accepts out-of-state MSW, without limit.

As noted by the appellant and described substantively in Finding of Fact #8, below, PERC has contracts with Casella for the disposal of all of its residues. The FEPR and ash contracts are each for 5 year terms, with provisions for subsequent 5 year extensions if both parties agree. If, for some reason, capacity at JRL is not available for the residues, Casella is responsible for providing capacity elsewhere. The contracts for the disposal of FEPR, ash and bypass state the title to these wastes passes from PERC to Casella when the transport vehicle leaves PERC. The contracts do not address the use of the wastes in the soft layer, nor has the Department approved ash or FEPR from one incinerator as soft layer material but not another. Like any other use of JRL, PERC has contracts for disposal of its wastes that must be honored; if conditions of the contracts are violated, the contracts contain provisions to remedy breaches in the contracts.

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06-096 CMR 2.1(B) defines aggrieved person as “any person whom the Board determines may suffer particularized injury as a result of a licensing or other decision. The use of the term “may” in the regulation creates a more permissive standard for administrative standing before the Board than applies to judicial standing. Consistent with this regulation, the Board’s practice has also generally allowed a broader interpretation of the phrase “may suffer particularized injury.” Here, the factual issues underlying the standing issue are closely related to the merits of the appeal, yet potentially more difficult for the Board to resolve than the merits. Therefore, although it appears unlikely the appellants will suffer particularized injury from the decision under review, the Board declines to dismiss the appeal for lack of standing, and under these unique circumstances finds that the appellants minimally satisfy the “aggrieved person” standard. This finding and the Board’s decision to proceed to the merits is informed by the fact that, for the reasons set forth in detail below, the appeal will be denied on other grounds.

5. REQUEST FOR PUBLIC HEARING

The minor revision application was filed on October 3, 2006, and was significantly modified on December 10, 2009. The Department did not receive any requests that it conduct a public hearing, or for the Board to assume jurisdiction.

The appellant requests that the Board conduct a public hearing on the issues it raises in its appeal: the minor revision license exceeds the scope of the Department’s statutory authority; the findings in the license are not substantiated by the record and are arbitrary and capricious; the applicant failed to meet its burden to satisfy the relevant licensing criteria; the exclusion of MSW from JRL’s underlying annual 310,000 ton MSW limit is unjustified by the record; the license is anticompetitive and violates fundamental fairness; and the license violates the Maine Legislature’s solid waste management hierarchy. The appellant proposes to present the testimony of Greg Lounder, Executive Director of MRC, regarding efforts to discuss the application and license with the Department. The appellant also stated it reserved the right to introduce evidence on the subject of current soft layer materials used at landfills both in Maine and out-of-state; Denis St. Peter, President of CES, Inc., is identified as a potential witness on this subject. The appellant also stated it may introduce evidence on the subject of the 310,000 ton annual limit; Michael Mains of Eden Environmental may be a witness on this subject. The appellant also stated it reserved the right to add to the list of potential witnesses.

The Board has considered the information contained in the permitting record, the arguments of the appellants, and the licensee’s response. Pursuant to 38 M.R.S.A. §341-D(4) and the Department’s regulations, holding a public hearing is discretionary. In this

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appeal the Board finds that the appellant did not involve itself in the permitting process during the nearly 4 years it was pending before the Department. The appellant also did not include the supplemental evidence it proposes to introduce into the record during a public hearing at the time it filed its appeal as required by 06-096 CMR 2.24(B)(2), nor summaries of all proposed testimony as required by 06-096 CMR 2.24(B)(5). Further, because the appeal did not provide the supplemental information it is not possible to determine that there is credible conflicting technical information regarding a licensing criterion, or that it is likely a public hearing would assist the Board in understanding the evidence. The Board finds that a public hearing in this case is not warranted to assist the Board in understanding the presented evidence.

6. REMEDIES REQUESTED

The appellant requests that the Board hold a public hearing on the appeal; see Finding of Fact #5, above.

The appellant also specifically requests the following from the Board:

A. That the Department's minor revision be modified as follows:

- "remove all references relating to the suitability (or lack thereof) of other waste streams placed as soft layer material, including but not limited to FEPR and ash, to avoid implying that those landfills have historically used unsuitable materials;
- "remove all references to the use of MSW as a soft layer for future cells at JRL and Maine Energy as it(s) sole supplier";
- "such that the 31,440 cubic yard carve-out for Cell 6 is the only minor revision applicable to License #S-020700-WD-W-M"; and
- "so that the total "MSW bypass" used for soft layer at JRL's Cell 6 and at future cells be included within the 310,000 ton annual limit placed upon Maine Energy and JRL".

B. Remand the rest and remainder of the Department minor revision to the Department for a full technical review and analysis, pursuant to the licensing amendment process, of the following:

- "the appropriate materials for use as soft layer, including but not limited to 'MSW bypass', ash and FEPR, and if demonstrated to be the preferred material for soft layer purpose"; and
- "how utilization of that MSW might be timed for placement in new cells in conjunction with other approved waste streams (e.g., tire chips, ash, FEPR) in a manner which minimizes its use pursuant to the established State hierarchy".

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7. BASIS FOR THE APPEAL OF THE DEPARTMENT LICENSE

The appellant contends the following:

- A. Increasing JRL's MSW limit from Maine Energy grants Maine Energy a competitive advantage over PERC.
- B. Increasing the amount of MSW Maine Energy can send to JRL calls into question the volume of MSW remaining for PERC.
- C. The switch from PERC-supplied FEPR and other materials for the soft layer to Maine Energy-supplied MSW negatively impacts PERC.
- D. The Department's minor revision license exceeds the scope of statutory authority because this license revision warrants a license amendment and exceeds the definition of bypass
- E. The Department's minor revision license, including the Department's selection of MSW bypass as appropriate soft layer material, is unsupported by substantial evidence in the record and is arbitrary and capricious.
- F. SPO's application failed to meet applicable licensing criteria.
- G. The exclusion of MSW bypass from the annual 310,000 ton allowance is not supported by the administrative record or the application.
- H. The Department's minor revision license violated fundamental fairness and is anticompetitive.
- I. The Department's minor revision license violates the State solid waste management hierarchy.

8. RESPONSE TO THE APPEAL

- A. Increasing JRL's MSW limit from Maine Energy grants Maine Energy a competitive advantage over PERC:

Appellant's Objection: The appellant states that the Department's minor revision license establishes Maine Energy as the sole provider of MSW bypass for use in the soft layer of new cells, and that this provides Maine Energy with a competitive

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advantage over PERC. The appellant also states that the Department characterizes the MSW to be used from Maine Energy as “MSW bypass” so that it does not count against Maine Energy’s and JRL’s current MSW limit.

Board Response: The Board finds that the appellant has misread the Department’s minor revision license. The minor revision license does not prohibit MSW bypass from PERC or the other 2 Maine incinerators from being used in the soft layer. The Board also finds that the only MSW JRL is licensed to accept is MSW bypass from the 4 Maine incinerators². MSW bypass is defined in the contracts the incinerators have with their customers; Finding of Fact #3 of the minor revision license recognizes the contractual requirements of the incinerators with regards to calling a bypass event. The Board further finds that no competitive advantage to Maine Energy was intended in the minor revision license, and takes note that the licensee’s November 15, 2010 response to the appeal states that NEWSME discussed the availability of MSW bypass from PERC with PERC representatives.

B. Increasing the amount of MSW Maine Energy can send to JRL calls into question the volume of MSW remaining for PERC:

Appellant’s Objection: The appellant states that the increase in MSW allowed to enter JRL raises questions about JRL’s ultimate capacity and whether there will be enough capacity for PERC and the other facilities with contracts to dispose of wastes at JRL.

Board Response: The Board finds that the volume of MSW bypass (the only type of MSW licensed for disposal at JRL) from PERC, ecomaine or Mid-Maine Waste Action Corp is not changed by the Department’s minor revision license since MSW bypass from these 3 incinerators is allowed into JRL without the restrictions applicable to MSW bypass from Maine Energy. The Board further finds that PERC has contracts with Casella for the disposal of its ash, FEPR, oversized bulky waste and MSW bypass; Casella is bound by these contracts to provide capacity for PERC’s wastes. Tabulation of the monthly summary report totals provided to the Department by JRL show JRL accepted 712,124.86 tons of waste in 2010; of that, 14, 911 tons of MSW bypass was used in the soft layer of Cell 6³.

² see Department license #S-020700-WD-N-A, dated April 9, 2004 and Department license #S-020700-WD-W-M, dated September 10, 2010

³ see “Juniper Ridge Landfill – Tracking of Some Categories of Waste”, dated January 27, 2011” and “Juniper Ridge Landfill Waste Volume Summary”, dated January 27, 2011

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C. The switch from PERC-supplied FEPR and other materials for the soft layer to Maine Energy-supplied MSW negatively impacts PERC:

Appellant's Objection: The appellant states the financial status of PERC is affected by the availability of landfill space, including at JRL, to dispose of its residue material. Before issuance of the Department's minor revision license, PERC supplied to JRL residuals (FEPR and ash) appropriate for soft layer placement. The minor revision license calls for the use of MSW from Maine Energy instead of FEPR and other materials from PERC. The change to solely using MSW bypass from Maine Energy as the soft layer is unjustified and unsubstantiated by the current record, and may have a direct negative financial impact on PERC at JRL, and because of the precedent the license sets, at future landfills as well.

Board Response: The Board again finds that the minor revision license does not modify JRL's amendment license approval to accept MSW bypass from any of the 4 Maine incinerators, including PERC, other than to modify the 310,000 ton annual limit placed solely on Maine Energy and MSW bypass from Maine Energy accepted at JRL. The Board also finds that the minor revision license does not require that only MSW bypass be used as the soft layer. In Finding of Fact #3 of the license the Department recognizes that the incinerators are limited in calling a bypass event by their contracts, and recommends that MSW bypass should be the primary waste used in the soft layer; elsewhere in same finding of fact it states Department staff have requested that the applicant "use MSW bypass as much as possible for the soft layer in each cell...". The Board further finds that although ash and FEPR from PERC was used in the soft layer of some of cells constructed at JRL since it was licensed to accept such wastes, PERC's contracts for the disposal of its residuals do not specify any use; rather, the contracts state that title to the residuals passes from PERC to Casella when the trucks leave PERC. When ash and FEPR were used in the soft layer, the residues came both from Maine Energy and PERC. The Board addresses the suitability of these wastes as soft layer material in Finding of Fact #8.E, below; however, the Board finds that it is apparent the other secure landfills in Maine licensed to accept MSW are already using this waste in the soft layer so the minor revision sets no precedent for its use. Finally, the Board finds that the monthly summary reports on wastes delivered to JRL show that JRL is unlikely to be able to construct the soft layer using MSW bypass unless PERC and/or the other incinerators are also able to supply MSW bypass.

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D. The Department's minor revision license exceeds the scope of statutory authority because this license revision warrants a license amendment and exceeds the definition of bypass:

Appellant's Objection: The appellant quotes 06-096 CMR 400.1.I which defines amendment as "Amendment means a modification to a license that would permit a solid waste facility to significantly increase capacity of the facility; significantly alter the siting, design, construction or operation of the facility; or significantly alter the nature of an activity to an extent that would require the Department to modify any findings with respect to any of the licensing criteria. Amendments do not include minor revisions and other alterations." The appellant states the minor revision application qualifies as an amendment application in 2 respects: (1) switching the type of material used in the soft layer alters the operation, construction and/or design of the landfill; and (2) the application significantly increases the capacity of Maine Energy's facility, the use of MSW instead of other materials at JRL, and the previous MSW capacity limits for Maine Energy and JRL. The appellant further states that the minor revision license inappropriately expands the definition of bypass, defined at 06-096 CMR 400.1.V; the appellant states the license exploits the definition to expand the amount of MSW that can be landfilled at JRL, and expand capacity of MSW at Maine Energy.

Board Response: The Board finds operation of JRL during placement of MSW bypass in the soft layer is not different than operation of the landfill when FEPR, whether from Maine Energy or PERC, is placed; both MSW bypass and FEPR are defined as MSW by 06-096 CMR 400.1.NNNN. The type of material used in the soft layer is not part of the design or construction of the landfill cells; it is placed after the construction is completed. The Board finds that the minor revision license approves no increase in capacity at JRL, the licensee. The license may allow an increase in capacity at Maine Energy (which is not the licensee but tied to the license through language in the amendment license), however the following language included in Condition #16.C of the amendment license, as affirmed by the Board on July 15, 2004, recognized that the 310,000 ton annual limit, proffered by Maine Energy and JRL and not within the Department's purview to impose, could be changed in the future:

...shall limit the total amount of (a) unprocessed MSW incinerated at Maine Energy and (b) MSW bypassed from Maine Energy for disposal at the WOTL and at Pine Tree Landfill's Secure III Landfill Expansion to no more than 310,000 tons in any calendar year, unless changes in conditions or circumstances occur that cause the Department to revise this cap; ...".

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The technical arguments for the use of MSW bypass in the soft layer are sufficient cause for modification of the 310,000 ton limit. The minor revision license does not expand the definition of bypass; indeed, in Finding of Fact #3 specific deference is provided for the contracts between an incinerator and its customers. The Board also finds that the minor revision license does not assure an increase in the amount of MSW delivered to Maine Energy and/or MSW bypass delivered to JRL, since the calling of a MSW bypass event is governed by contracts between Maine Energy and its customers; PERC also has the ability to reduce the amount of MSW bypass from Maine Energy used in the soft layer by scheduling routine maintenance at its facility for the time when MSW bypass will be needed for soft layer placement at JRL. Thus, the Board finds that the Department appropriately processed the application as a minor revision so that it could evaluate whether the proposal "...could have a potential impact on public health or welfare, the environment, or create a nuisance⁴."

- E. The Department's minor revision license, including the Department's selection of MSW bypass as appropriate soft layer material, is unsupported by substantial evidence in the record and is arbitrary and capricious:

Appellant's Objection: The appellant states that its review of the record for the minor revision license shows there is no evidence in the administrative record supporting the Department's decision to use MSW in the soft layer in JRL's Cell 6 and future cells versus other residual materials. The appellant also states that both MRC and PERC are concerned that the contents of unprocessed MSW could pierce the landfill's primary liner as well as impact the leachate collection system in Cell 6 and future cells. The appellant further states that the minor revision license does not contain physical or performance specifications for MSW bypass, nor any requirements that JRL sort, screen, process or inspect MSW bypass prior to its placement as a soft layer, consistent with the purpose of soft layer established in the solid waste management regulations. Finally, the appellant states there is no evidence that the Department evaluated the use of MSW bypass in the soft layer against the criteria that it not impact the environment, public health or welfare or create a nuisance; the appellant states the decision is arbitrary and capricious, an abuse of discretion and not grounded in fact or law.

Board Response: The Board finds that, as with any alteration of any existing license for an operating facility, the administrative record must include the agency record for the facility. Otherwise, each subsequent alteration to a license would need to include

⁴ 06-096 CMR 400.1.JJJJ – definition of minor revision

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all aspects of the facility's siting, design and operation. In this minor revision license, without the information included in the amendment license and even the Pine Tree minor revision license that included the initial 310,000 ton annual limit (Department Order #S-001987-WD-QA-M, Corrected Copy) that is the focus of this appeal, all parties would have a difficult time evaluating the issues. Likewise, Department staff are not expected to ignore operational issues found and resolved at this landfill and other landfills, when evaluating the continued operation of JRL. The Board also finds the minor revision application includes a statement that experience with other materials (including FEPR, ash, contaminated soils and bark) used in the soft layer at Casella-operated landfills eventually impede leachate flow to drainage systems within the landfill, and that investigations into the problems undertaken with the cooperation of Department staff have resulted in Department staff recommending utilizing MSW in new landfill cells. The Board also finds that, as explained in the minor revision license, MSW is used in the soft layer at the other secure landfills in Maine licensed to accept MSW; problems with the use of MSW in the soft layer have not been documented, nor does the appeal contain any information to the contrary. The design of generator-owned landfills for the disposal of special wastes includes structures to improve leachate collection that are not found in secure landfills that accept a variety of wastes. Finally, the Board finds that the minor revision license appropriately relies on the application materials, and Department staff's experience with landfill design, construction and operation.

F. SPO's application failed to meet applicable licensing criteria:

Appellant's Objection: The appellant states that under 06-096 CMR 2.11.F it is the applicant's burden to affirmatively demonstrate that it will meet all of the applicable licensing criteria. The applicable criteria are identified as 06-096 CMR 400.3.B(2)(b) and 06-096 CMR 401.2.D(4)(a)(vii). These criteria require that the proposal not impact the environment, public health or welfare, or create a nuisance; and that the proposal to use of MSW bypass as the soft layer demonstrate that this is the best material for use as the protective soft layer. The appellant states the applicant failed to meet either requirement because it did not include supporting documentation proving that experience or investigation had shown problems with other wastes used or that MSW was a better material; nor did the applicant meet its burden to demonstrate that the use of MSW bypass in the soft layer would not impact the environment, public health or welfare, or create a nuisance.

Board Response: The Board finds that the applicant included sufficient information in the minor revision application for the Department to evaluate the proposal, and that the applicant adequately met its burden of proof. As noted in the application,

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Department staff were involved in resolution of the problems caused by the use of other wastes in the soft layer at Casella-operated landfills, and thus were familiar with the subsequent investigations; these investigations are noted in documents such as construction meeting notes, periodic inspection reports and annual reports that Department staff are familiar with and/or are in the facility files. The Board finds that there was no reason for Department staff to require SPO to re-create existing information for inclusion in this minor revision file. The Board further finds that MSW bypass is a waste already licensed for disposal at JRL, and there is no reason to expect MSW bypass used in the soft layer to impact the environment, public health or welfare, or create a nuisance since JRL already successfully handles MSW bypass.

- G. The exclusion of MSW bypass from the annual 310,000 ton allowance is not supported by the administrative record or the application:

Appellant's Objection: The appellant refers to the findings of fact and Condition #16.C of the amendment license regarding the basis for the 310,000 ton annual limit on the amount of MSW managed between Maine Energy and JRL. The appellant states that when this minor revision application was filed in 2006 it was a request to increase the 310,000 ton annual limit to 325,000 tons per year because power production at Maine Energy could be adversely affected under the 310,000 ton per year limit. In 2009, the minor revision application was modified to retain the 310,000 ton per year limit at Maine Energy and JRL while excluding the amount of MSW required for the soft layer from the limit. The appellant states neither the minor revision application nor the Department record contain sufficient information to substantiate that power production at Maine Energy would be adversely affected if the MSW bypass required for soft layer use at JRL was included in the 310,000 ton per year limit. The appellant also states that the sources of MSW bypass in the minor revision license differ substantially from those listed in the amendment license in that the minor revision license calls for the MSW bypass to come from Maine transfer stations, and the amendment license limits the sources as the 4 Maine incinerators.

Board Response: The Board finds that the Department found in Finding of Fact #3 of the minor revision license that the 310,000 ton annual limit has proven to be workable, and that the minor revision license makes a clear break between a possible increase in tonnage at Maine Energy caused by the use of MSW bypass in the soft layer of new cells. The use of MSW bypass for the soft layer is based on a technical need, and Maine Energy's contracts with its customers define the circumstances under which a bypass event can be called. The Board also finds that the minor revision license adequately explains the logistical issues associated with scheduling maintenance at Maine Energy during the high-tonnage time of year, and the risk to

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Maine Energy if it schedules maintenance to bypass MSW to JRL to provide soft layer material and then has to cut back on the MSW that can be delivered to Maine Energy later in the year in order not to exceed the 310,000 ton annual limit, which is retained in the minor revision license; only Maine Energy faces this limitation. The Board further finds that the reference to MSW bypass coming from Maine transfer stations is based on Department staff experience gained since issuance of the amendment license; it ensures out of state MSW does not go to JRL. Finding of Fact #13.A of the amendment license includes the following sentence: "The applicant has committed, in a letter dated March 9, 2004, that no out of state MSW will be bypassed to the landfill, and that waste from the tipping floor of any of the incinerators will not be transported to the landfill if it contains any out of state waste." Since Maine Energy, and PERC, commingle MSW originating in Maine and out of state, MSW bypass is delivered directly from Maine transfer stations (or curbside haulers or containers) to JRL to ensure out of state waste is not delivered. Finally, the Board finds that the sources of MSW bypass licensed by the minor revision for disposal at JRL remain the 4 Maine incinerators.

H. The Department's minor revision license violated fundamental fairness and is anticompetitive:

Appellant's Objection: The appellant states the minor revision license: grants Maine Energy the ability to provide, at the expense of the other Maine incinerators, MSW bypass for the soft layer of Cell 6 and future cells at JRL; displaces the use of other materials for the soft layer at JRL at the expense of PERC and other incinerators; and puts PERC at a competitive disadvantage with Maine Energy by increasing the amount of MSW that Maine Energy can send to JRL and increasing the amount of out of state waste Maine Energy can accept.

Board Response: The Board again finds that the minor revision license does not require that the MSW bypass used in the soft layer of Cell 6 and future cells come exclusively from Maine Energy. The Board also again finds that MSW bypass events are governed by contracts between the incinerators and their customers; JRL has been unable to obtain sufficient MSW bypass for the soft layer in Cell 6 since only Maine Energy has provided MSW bypass since the cell was completed. As stated in the minor revision license, the Department recognized that sufficient MSW bypass might not be available for the soft layer; thus, the wastes historically used as soft layer material at JRL would be used to make up the balance of the required soft layer. The Board also finds that some of soft layer may include residuals from PERC, but JRL is no more required to solely use residuals from PERC than it is required to use wastes from Maine Energy. The Board further finds that the minor revision license is not

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unfair and is not anticompetitive. Only Maine Energy includes an annual limit on the amount of MSW it can accept. Finally, the Board finds that because the amount of MSW bypass used in the soft layer is separate from the 310,000 limit and limited only to the amount of material needed to construct the soft layer of each cell, PERC and the other Maine incinerators have the ability to control the amount of MSW bypass from Maine Energy by themselves scheduling maintenance activities or outages to coincide as much as possible with placement of soft layer material in new cells at JRL.

I. The Department's minor revision license violates the State solid waste management hierarchy:

Appellant's Objection: The appellant states the minor revision license violates the State's hierarchy because it allows and promotes MSW to bypass incinerators, without qualifying as certifiable MSW bypass, directly to landfills for use a soft layer material. The appellant states the minor revision license will result in more MSW being deposited in Maine's only state-owned landfill, rather than less. The appellant further states the minor revision license highlights the inherent conflict created by SPO owning and operating JRL while being the lead agency responsible for overseeing and managing Maine's long-term solid waste management strategy, and that the hierarchy is undermined by this relationship.

Board Response: The Board finds that the waste management hierarchy language of 38 M.R.S.A. §2101 states, in part: "It is the policy of the State to use the order of priority in this subsection as a guiding principle in making decisions related to solid waste management." The hierarchy is a policy that guides decisions on waste management program planning and implementation; the hierarchy is not a regulatory standard that is applied to individual waste facility licensing decisions of a technical nature. The Board also finds that 06-096 CMR 403.5(A)(3) requires that all incinerators have a contract(s) for the disposal of ash, bypass and residues; neither the Department nor the Board have the authority to require a facility to contract with one disposal facility over another. Both Maine Energy and PERC have contracts with JRL for the disposal of these wastes, and MSW bypass has been disposed at JRL since the State assumed its ownership.

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9. ALL OTHER

The Findings of Fact remain as set forth in Department Order #S-020700-WD-W-M except that the Board finds the following sentence in Finding of Fact #3 of the minor revision license will be modified as noted, to clarify that the MSW bypass for the soft layer may come from any Maine incinerator:

“...All Department approvals for construction of new cells will include approval for the placement of the specific cubic yardage of MSW bypass from the 4 Maine incinerators needed for an adequate soft layer; the portion of this cubic yardage that comes from Maine Energy will be separate and excluded from the 310,000 tons per year limit on MSW placed on Maine Energy and Juniper Ridge by Condition #16.C of the amendment license.”

BASED on the above Findings of Fact, the Board makes the following CONCLUSIONS:

1. The appellant has standing, is aggrieved and has made a timely appeal of the Department Order.
2. The Board denies the request for a public hearing on this appeal.
3. The appellant has submitted no new or additional information or arguments that would warrant vacating the Department's decision.
4. To clarify the possible sources of MSW bypass for the soft layer, the Board modifies a sentence in Finding of Fact #3, on page 7 of the Department Order as stated in Finding of Fact #9.
5. All other conclusions remain as set forth in Department Order #S-020700-WD-W-M.

THEREFORE, the Board DENIES the appeal by MRC and PERC to vacate or modify in part, or remand to the Department, Department Order #S-020700-WD-W-M and AFFIRMS Department Order #S-020700-WD-W-M, with the following modification to Finding of Fact #3:

“...All Department approvals for construction of new cells will include approval for the placement of the specific cubic yardage of MSW bypass from the 4 Maine incinerators needed for an adequate soft layer; the portion of this cubic yardage that comes from Maine Energy will be separate and excluded from the 310,000 tons per year limit on

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MSW placed on Maine Energy and Juniper Ridge by Condition #16.C of the amendment license.”

DONE AND DATED AT AUGUSTA, MAINE THIS 3rd DAY OF March, 2011.

BY:


Susan M. Lessard, Chair

PLEASE NOTE THE ATTACHED SHEET FOR GUIDANCE ON APPEAL PROCEDURES.

Date of initial receipt of application: October 4, 2006

Date of application acceptance: October 25, 2006

Date filed with Board of Environmental Protection: September 13, 2010

Date of initial receipt of appeal: October 13, 2010

Date of appeal with Board of Environmental Protection: March 3, 2011